STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PHILLIP MOORE, II,

Defendant-Appellant.

UNPUBLISHED
September 20, 2007

No. 271807
Oakland Circuit Court
LC No. 06-207396-FH

Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Defendant appeals by right his conviction following a jury trial of two counts of criminal sexual conduct in the second degree, MCL 750.520c(1)(a) (victim under 13 years old). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to serve concurrent terms of imprisonment of three to 25 years. Defendant argues that the prosecutor failed to present legally sufficient evidence to support his convictions and that certain prosecutorial argument denied him a fair trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

We review de novo the sufficiency of evidence in a criminal case by viewing the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that each element of the crime was proved beyond a reasonable doubt. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001).

The complainant, who was 15 years old at the time of trial, testified that defendant had resided as part of her household for between one and two years starting when she was four or five years old, then did so again for a period when she was eight or nine years old. Asked if something made her uncomfortable during the latter period, complainant replied that on two or more occasions defendant would inspect her vaginal area for cleanliness. Complainant added that at the time she required no assistance in bathing, and that defendant had not endeavored to help her clean any other part of her body. She elaborated that she emerged from the bathtub wearing a towel, that defendant came into the bathroom, put his hand under her towel, touched her vagina, "moved it around a little," smelled his hand, then ordered her back to the tub for further washing. The child would comply, after which defendant would repeat his inspection.

The complainant's mother identified defendant as someone she had dated and had sporadically lived with. The mother confirmed that complainant had suffered from no condition

requiring extra cleaning of her vaginal area, including urinary tract or yeast infections, and added that she never asked defendant to focus any special attention to the child's vaginal area.

On appeal, defendant argues that the evidence was insufficient to prove that his examination of complainant's genitalia could reasonably be construed as having been done for a sexual purpose. We disagree. A person commits second-degree criminal sexual conduct if he engages in sexual contact with another person who is under the age of 13. MCL 750.520c(1)(a). MCL 750.520a(o) defines "sexual contact" as including "the intentional touching of the victim's . . . intimate parts . . . if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for: (i) Revenge (ii) To inflict humiliation [or] (iii) Out of anger." The term "intimate parts" includes "the primary genital area, groin, inner thigh, [and] buttock." MCL 750.520a(d).

Defendant acknowledges the evidence that he "checked" complainant's "vaginal area by touching it," but argues that he did not otherwise observe the complainant while she was unclothed. Defendant cites no authority for the proposition that manual contact with of a girl's vagina cannot be construed as having taken place for sexual purposes without evidence of further visual observation of, or suggestive conversation with, that girl.

A rational juror could easily conclude from the evidence that defendant gratuitously took it upon himself to manually and olfactorily explore his girlfriend's young daughter's genital area and that defendant did so not for the medical reason trial counsel suggested, but for purposes of his own gratification. We decline defendant's invitation to reassess the jury's interpretation of that evidence. "It is the province of the jury to determine questions of fact and assess the credibility of witnesses. *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998).

Next, defendant asserts the following prosecutorial remarks denied him a fair trial:

> Now, it's been conceded that there was a touch. I don't think there's been any evidence on the record whatsoever that [the complainant] wasn't touched in her vagina by the defendant and that he didn't smell his hand not once, but twice after she got out of the bathtub.

Defendant admits that there was no objection below. An unpreserved claim of prosecutorial misconduct is reviewed for plain error affecting substantial rights. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). In such cases, reversal is proper only when the defendant is actually innocent, or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW 2d 130 (1999). Comporting with this standard is this Court's pronouncement in *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996), that "[a]bsent an objection or a request for a curative instruction, this Court will not review alleged prosecutorial misconduct unless the misconduct is sufficiently egregious that no curative instruction would counteract the prejudice to defendant or unless manifest injustice would result from failure to review the alleged misconduct."

Defendant first argues that the defense never conceded that any touching took place. Although prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, they are "free to argue the evidence and any reasonable inferences that may arise from

the evidence." *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). We agree that the defense did not explicitly make such a concession, but conclude that defense counsel strongly implied such a thing in her opening statement. Having conceded that the complainant's testimony would indicate that defendant had "checked" her, counsel then admonished the jury that it was imperative the jury consider whether what defendant did was for a sexual purpose. Having nowhere urged the jury to disbelieve the complainant's account of defendant's conduct, defense counsel thus signaled the strategic decision to attack not the evidence of defendant's physical conduct, but rather to attack the inference that he had acted for a sexual purpose.

The prosecutor's blunt statement that defendant conceded the touching, was then at worst, a minimal exaggeration. Any prejudice to defendant should thus have readily been cured by the trial court's instructions to the jury to "return a true and just verdict based only on the evidence," and that the "lawyers' statements and arguments are not evidence." See *People v Callon*, 256 Mich App 312, 331; 662 NW2d 501 (2003). "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant additionally argues that the challenged comments improperly "informed the jury he must be guilty because he failed to present any evidence to the contrary, that she was not touched, or that he did not smell his hand afterwards." We disagree.

"A prosecutor may not comment upon a defendant's failure to testify." *People v Davis*, 199 Mich App 502, 517; 503 NW2d 457 (1993); MCL 600.2159. Although commentary to the effect that the prosecution's evidence went unrebutted can act as a reminder that the defendant chose not to rebut the prosecutor's case, such comments should be reviewed in context, and in light of defense arguments and the relationship they bear to the evidence admitted at trial, to determine whether defendant was denied a fair and impartial trial. *Callon, supra* at 330-331.

In this case, the challenged comments, considered in context, served not to suggest that the defense had failed in some duty to prove or disprove something, but instead pointed out that whether the touching complainant described had taken place was scarcely at issue, considering that the main theory of the defense was that the touching was for legitimate, not sexual, reasons. This rebuttal argument was thus responsive to defense counsel's closing.

Moreover, to the extent that the challenged remarks could have struck the jurors as a comment on the defendant's failure to bring evidence or otherwise disprove the prosecutor's case, the trial court's instructions that defendant was presumed innocent, that "defendant is not required to prove his innocence or to do anything," and that "the *prosecutor* must prove each of the . . . elements beyond a reasonable doubt . . ." would have cured any error (emphasis added). *Id*.

For these reasons, we conclude that defendant has failed to show that the challenged remarks resulted in the conviction of an innocent man or threw the integrity of the proceedings into doubt. *Id*. at 331; *Carines, supra* at 763.

Defendant also argues that defense counsel was ineffective for failing to object to the prosecutor's remarks to which he takes issue. To prevail, defendant must "show that (1) counsel's performance was below an objective standard of reasonableness and (2) a reasonable

probability that the outcome of the proceeding would have been different but for trial counsel's errors." *Ackerman*, *supra* at 455.

Defendant's argument fails. Had defense counsel objected to the comments in question, at best, counsel would have obtained curative instructions similar to those that were in fact ultimately given, as quoted above. Thus, defendant is unable to establish "a reasonable probability that the outcome of the proceeding would have been different." *Id.* Because defendant has shown no prejudice resulting from defense counsel's alleged shortcomings, defendant's claim of ineffective assistance of counsel is without merit.

We affirm.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Kurtis T. Wilder